APPEAL NO. 060729
FILED JUNE 12, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on March 1, 2006. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) impairment rating (IR) is 10%, and that the claimant did waive the right to dispute the IR by failing to contest the IR in a timely manner. The claimant appealed, disputing both the determination of IR and waiver. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It was undisputed that the claimant sustained a compensable lumbar injury on ___. The evidence reflects that on June 11, 2002, the claimant underwent spinal surgery, including a fusion at the L4-5 level. The claimant was examined by a designated doctor on March 4, 2002, who certified that the claimant had not yet reached maximum medical improvement (MMI). On March 1, 2003, the claimant's treating doctor examined the claimant and certified in a Report of Medical Evaluation (TWCC-69) dated March 1, 2003, that he reached MMI on March 4, 2003, with a 25% IR, under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category V. For reasons unclear from the record, a second designated doctor was appointed. The second designated doctor examined the claimant on April 17, 2003, and certified that the claimant reached MMI on March 4, 2003, with a 10% IR, placing the claimant in Lumbosacral DRE Category III. We note that the benefit review conference report reflects that the parties agreed the claimant reached MMI statutorily on March 4, 2003.

WAIVER

The hearing officer found that the claimant filed a dispute of the designated doctor's 10% IR on November 29, 2005, a period of over two years after the benefits had been paid to the claimant. This finding was not appealed. The hearing officer then concluded that the claimant waived the right to dispute the IR by failing to contest the IR in a timely manner. The carrier in its response argues that prior Appeals Panel decisions stressed the need for finality in MMI and IR determinations and required that a challenge to a designated doctor's report take place within a reasonable time. However, that line of cases which established a reasonable time and proper purpose analysis were overturned in Appeals Panel Decision (APD) 013042-s, decided January 17, 2002. We held in APD 013042-s, *supra*, that 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) "does not permit the analysis of whether an amendment was made for a

proper purpose or within a reasonable time." Rule 130.1(c)(3) requires that the assignment of an IR for the compensable injury be based on the injured employee's condition as of the MMI date. The carrier contended in its brief of relevant law that the cases overturning the reasonable time and proper purpose analysis are distinguishable because in the instant case there are no amended ratings but rather a single IR from the treating doctor and a single IR from the designated doctor. Neither Rule 130.5 nor 130.6 contain any express time limits for disputing an IR or for a designated doctor to amend an IR.

There are some instances in which a party may waive the right to dispute the IR. Rule 130.102(g) which provides if there is no pending dispute regarding the date of MMI or the IR prior to the expiration of the first quarter of supplemental income benefits, the date of MMI and IR shall be final and binding. However, Rule 130.102(g) is not applicable in the instant case under the facts presented at the CCH.

At the CCH the carrier argued that "an equitable waiver" should be applied in this case. We disagree. No statutory authority or Rule was cited by the carrier at the CCH or by the hearing officer in his discussion requiring a time frame for disputing the IR under the circumstances of the instant case. We decline to impose a deadline where one is not provided for by rule or statute. We note that Rule 130.12 is not applicable because it applies only to those claims with initial MMI/IR certifications made on or after June 18, 2003. The hearing officer's determination that the claimant waived his right to dispute the IR by failing to contest the IR in a timely manner is reversed and a new decision rendered that the claimant did not waive his right to dispute the IR by failing to contest the IR in a timely manner.

IR

The carrier correctly notes in its appeal that the certification given by the treating doctor is invalid because the MMI date given is a prospective date. The treating doctor examined the claimant on March 1, 2003, but certified in a TWCC-69 dated March 1, 2003, that MMI was on March 4, 2003.

The hearing officer found that the 10% IR certified by the designated doctor is supported by a preponderance of the evidence. The claimant argues that the designated doctor fails to give the claimant a rating for loss of motion segment integrity because he feels the loss of motion segment integrity was caused by the surgery rather than the compensable injury itself. The claimant's assertion that the designated doctor found loss of motion segment integrity due to surgery is incorrect because the designated doctor states that the surgery "created a loss of motion in the spine as opposed to having greater motion with loss of motion segment integrity." The designated doctor in a letter of clarification dated August 22, 2003, referenced the AMA Guides stating surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and irrespective of whether the patient has a favorable or unfavorable response to treatment. Rule 130.1(c)(3) provides assignment of an IR for

the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical records and the certifying exam. However, there is no indication in the narrative attached to the certification that the designated doctor believed that the claimant met the criteria established in the AMA Guides for loss of motion segment integrity but declined to place him in that category because the loss of motion segment integrity was caused by the surgery. Rather, the designated doctor explained in his narrative report that the claimant did not meet the criteria established by the AMA Guides for receiving an impairment rating for loss of motion segment integrity. The evidence established that the spinal surgery was a one-level fusion not a multi-level fusion, so Advisories 2003-10, signed July 22, 2003, and 2003-10b, signed February 24, 2004, with respect to multi-level fusions, are not applicable. Further, there was no medical evidence in the record regarding specific measurements which would indicate the applicable criteria for loss of motion segment integrity had been met. There is sufficient support in the evidence to support the hearing officer's determination that the claimant's IR is 10%.

We affirm the hearing officer's determination that the claimant's IR is 10%. We reverse the hearing officer's determination that the claimant did waive the right to dispute the IR by failing to contest the IR in a timely manner and render a new determination that the claimant did not waive the right to dispute the IR by failing to timely contest the IR in a timely manner.

The true corporate name of the insurance carrier is **VALLEY FORGE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

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Thomas A. Knapp

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Robert W. Potts
Appeals Judge